NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JAMES JOHNSON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2889 EDA 2012

Appeal from the Judgment of Sentence July 3, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012949-2011

BEFORE: SHOGAN, J., OTT, J., and PLATT, J.*

MEMORANDUM BY OTT, J. **FILED APRIL 29, 2014**

James Johnson appeals from the judgment of sentence imposed in the Court of Common Pleas of Philadelphia County, following his conviction on charges of burglary and criminal trespass.[1] The jury acquitted Johnson on charges of terroristic threats, simple assault, reckless endangerment, and attempted theft.[2] The criminal trespass charge merged with burglary; and the trial court sentenced Johnson to the statutory maximum sentence of 10 to 20 years' incarceration. In this timely appeal, Johnson claims there was

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 3502(a), 3503(a)(1), respectively.

[2] 18 Pa.C.S. §§ 2706, 2701, 2705 and 901/3921(a), respectively.

insufficient evidence to support the burglary conviction where the jury acquitted Johnson of the predicate offense of attempted theft, and there was insufficient evidence to prove Johnson entered the residence with the intent of committing a theft or any other offense.[3] Following a thorough review of the submissions by the parties, relevant law, and the certified record, we affirm.[4]

We begin our analysis stating our standard of review:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact while passing upon the credibility of witnesses and the weight of the

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[3] Although Johnson poses this sufficiency challenge in two questions, they are essentially the same issue and we will address them together.

[4] In both his post-sentence motion and Pa.R.A.P. 1925(b) statement, Johnson also argued his sentence was manifestly excessive and sought reconsideration of that sentence. However, that issue has not been raised before this Court. Additionally, Johnson has not challenged the sufficiency of the evidence regarding his conviction of criminal trespass.

> evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Antidormi, 84 A.3d 736, 756 (Pa. Super. 2014).

The challenge to the sufficiency of the evidence is based on Johnson's argument that, because he was acquitted of attempted theft, the burglary conviction is unsupportable.

The Commonwealth's evidence, as summarized by the trial court is as follows:

> On October 26, 2011 between 4:30 and 5:00 pm, the Complainant, Mr. Jared Carrell was working from home at his apartment located at 408 Spruce Street in Philadelphia. Mr. Carrell is the manager of the three units in the building, and has lived there since 2005. Mr. Carrell's brother Daniel, the only other person who lived in the apartment, was at work. Mr. Carrell's cousin was waiting outside of the apartment to get her keys back from Mr. Carrell, who had used them to take care of her dogs while she was out of town. As his cousin was in a rush and Mr. Carrell expected to be gone very briefly, he did not bring his keys and instead left his unit door unlocked and the two doors to the building propped open. His cousin was parked a few buildings away from Mr. Carrell's. After giving the keys to his cousin, Mr. Carrell went into the building, closed the two doors behind him, and proceeded up to his apartment on the third floor of the building. Mr. Carrell was out of the building for less than one minute.
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> Upon re-entering his apartment, Mr. Carrell returned to his work in the living room, making phone calls and sending emails. After approximately ten minutes, Mr. Carrell went down the hallway to the restroom. On his way to the restroom, he looked into his brother's room and saw nothing out of the ordinary. However, when Mr. Carrell was in the bathroom, he heard what he claims was a "rummaging" noise in his brother's room, which was located directly next to the bathroom. He yelled out his brother's name several times, but did not receive an answer. When Mr. Carrell left the restroom and looked around the corner, he saw Defendant James Johnson getting out from under the

> bed and to his feet in Daniel's room. Both Mr. Carrell and Daniel testified that neither of them knew [Johnson], nor did either of them give him permission to be in their apartment. Daniel has furniture in his room, as well as several valuable personal items such as a television, a computer, and an iPad, but Daniel testified that nothing was missing or damaged in the apartment.
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> When Mr. Carrell demanded that [Johnson] tell him what he was doing there, [Johnson] claimed that he was there doing work, moving someone out of the apartment. According to testimony from both Daniel and Mr. Carrell, no one was moving out of the building at that time. There was no moving equipment present and no other movers at the building.
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> As [Johnson] started to leave the apartment, Mr. Carrell grabbed him to see what was in his coat. [Johnson] turned around and swung at Mr. Carrell, yelling at him "get your F-ing hands off of me" and "I'll kill you." Mr. Carrell testified that while in the apartment, [Johnson] reached into the breast pocket of his coat. Mr. Carrell unlocked the door, [Johnson] ran out of the building, and Mr. Carrell chased after him. Immediately upon exiting the building, Mr. Carrell started shouting that his apartment had been robbed and he urged people to call the police. A chase ensued; Mr. Carrell occasionally caught [Johnson] before he ran away again; there were physical and verbal confrontations between the two men during the chase. During his pursuit, Mr. Carrell called the police. While Mr. Carrell was pursuing him, [Johnson] yelled that he had a gun. Eventually, Mr. Carrell got [Johnson's] coat off of him.
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> The police arrived and arrested [Johnson]. The arresting officer, Joseph Thomas, testified that he found [Johnson] and Mr. Carrell in a verbal confrontation at 604 South Washington Square, on the sidewalk of the park. He did not witness Mr. Carrell chasing [Johnson], but rather arrived after the chase was over. According to Officer Thomas, he did not recover any weapons or other property from [Johnson]. Mr. Carrell called Daniel at work saying that he was in the park, at which point Daniel went to the house and locked the apartment doors that were unlocked from when Mr. Carrell ran after [Johnson].

Trial Court Opinion, 07/05/2013, at 1-4.

As noted, the jury convicted Johnson of burglary and criminal trespass, but acquitted him of all other charges, including attempted theft. The definition of burglary is central to understanding this appeal. In relevant part, the statute regarding burglary states:

> **(a) Offense defined.--**A person commits the offense of burglary if, with the intent to commit a crime therein, the person:
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> > (1) enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense any person is present;
> > (2) enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense no person is present;

18 Pa.C.S. § 3502(a). There is no dispute that Johnson entered the apartment building (an occupied structure adapted for overnight accommodation) at which time no person was present.[5]

At issue is whether the Commonwealth proved, beyond a reasonable doubt, that Johnson intended to commit a crime as he entered the building. Johnson argues that because the Commonwealth charged him with attempted theft, the underlying offense for burglary, and the jury acquitted him of that offense, the Commonwealth failed to prove he intended to commit theft, or any other crime. Moreover, according to Johnson, because

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[5] There was no indication that any other tenant was in the building, and Mr. Carrell was outside of the building when Johnson entered it.

the intent to commit a crime is an element of burglary, the conviction is unsupported by the evidence and must be vacated. We disagree.

As stated in ***Commonwealth v. Miller***, 35 A.3d 1206, 1208 (Pa. 2012), "The question before us implicates the general issue of inconsistent verdicts, which, under longstanding federal and state law, are allowed to stand so long as the evidence is sufficient to support the conviction."[6]

Our Supreme Court explained the difference between ***Commonwealth v. Magliocco***, 833 A.2d 479 (2005), and the circumstances found in ***Miller***; a difference critical to our instant analysis. In ***Magliocco***, the defendant was convicted of ethnic intimidation but acquitted of the predicate offense of terroristic threats. The conviction was reversed, based upon the specific requirements of ethnic intimidation. A person is guilty of ethnic intimidation "If, with malicious intention toward the race … of another individual or group of individual, he commits an offense under any other provision of this article …" ***Miller***, 35 A.3d at 1210. Accordingly, a conviction of ethnic intimidation requires the commission/conviction on the predicate offense as an element of that crime. Therefore, because Magliocco was acquitted of terroristic threats as the predicate offense, that element of ethnic intimidation was not met and he could not be convicted of ethnic intimidation.

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[6] The crime at issue in ***Miller*** was second-degree murder. The jury found Miller guilty of second-degree murder but acquitted him of the underlying offense of robbery.

In ***Miller***, the crime at issue was second-degree murder, which does not require a conviction on the underlying felony. Second-degree murder only requires the killing be committed during the "perpetration of a felony." 18 Pa.C.S. 2502(b). ***Miller*** noted that "perpetration of a felony" is broadly defined as the commission of or an attempt to commit the crime. Therefore, a conviction of second-degree murder does not require the actual conviction on the underlying felony.

The crime of burglary, like second-degree murder, does not require the conviction of a predicate offense as an element of the crime. Indeed, the definition of burglary does not even require engaging in the perpetration of a crime, it only requires an *intent* to commit a crime. The Commonwealth is not even required to specify the underlying crime. ***Commonwealth v. Alston***, 539 Pa. 202, 651 A.2d 1092 (1994). Because a conviction of a predicate offense is not required under the definition of burglary, the failure to obtain a conviction of a predicate offense is not fatal to the burglary conviction.

Here, we must examine the rationale behind allowing an inconsistent verdict to stand.

> While recognizing that the jury's verdict appears to be inconsistent, we refuse to inquire into or to speculate upon the nature of the jury's deliberations or the rationale behind the jury's decision. Whether the jury's verdict was the result of mistake, compromise, lenity, or any other factor is not a question for this Court to review. ***See*** [***Commonwealth v.***] ***Campbell***, [651 A.2d 1096 (Pa. 1994)] ***supra***, at 1100-1101 (discussing [***United States v.***] ***Powell***, [469 U.S. 57, (1984)],

> ***supra***). We reaffirm that an acquittal cannot be interpreted as a specific finding in relation to some of the evidence, and that even where two verdicts are logically inconsistent, such inconsistency alone cannot be grounds for a new trial or for reversal. Furthermore, the "special weight" afforded the fact of an acquittal plays no role in the analysis of inconsistent verdicts, because, by definition, one of the verdicts will always be an acquittal.

Commonwealth v. Miller, 35 A.3d at 1213.

Further, recognizing that we are not allowed to inquire into or speculate about the reason for the acquittal, we may draw no specific conclusion from the acquittal. The acquittal on the charge of attempted theft, therefore, does not negate the inference that Johnson intended to commit a theft upon entering the Carrell apartment.[7]

The salient question remains, did the Commonwealth present sufficient evidence to prove Johnson's intent to commit a crime. In this regard, the trial court opined:

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[7] Pursuant to the jury charge, there were four elements to attempted theft.

> First, that the defendant attempted to take moveable property; second, that the moveable property of another could be changed, the location could be changed; third, that the attempted taking was unlawful; and fourth, that the attempted taking was with the intent to deprive Jared Carrell of his property.

N.T. Trial, 05/02/2012 at 118. Even if, for the sake of argument, we accepted the proposition that *attempted* theft equates to *intent* to commit theft, and the acquittal of attempted theft was the result of a failure to prove at least one of the elements of that crime, as opposed to lenity, mistake or any of the other possible reasons for acquittal, there is nothing to indicate that the jury found intent be the lacking element.

In addition to entering the structure, the [d]efendant must also have intended to commit a crime inside. Evidence of intent with regard to the crime of burglary does not need to be direct; rather, intent can be inferred from the circumstantial evidence surrounding the incident. ***Commonwealth v. Hardick***, 475 Pa. 475, 380 A.2d 1235 (1977). The intent required to make out the charge of burglary may be found in the defendant's words or conduct or from the attendant circumstances, but the actions must bear a reasonable relationship to the commission of the crime. ***Commonwealth v. Jacobs***, 247 Pa. Super. 373, 372 A.2d 873 (1977). There is both a lack of unanimity and near silence in the Commonwealth on the issue of what constitutes sufficient proof of intent for the crime of burglary. Some cases have found that entry alone is sufficient for a finding of intent for theft. ***Commonwealth v. Freeman***, 225 Pa. Superior Ct. 396, 313 A.2d 770 (1973). In ***Commonwealth v. Del Marmol***, the Pennsylvania Superior Court held that a jury could reasonably infer intent to commit larceny when a defendant was caught in the act of breaking into an apartment. 206 Pa. Superior Ct. 512, 214 A.2d 264 (1965). The judge noted that "the fact that the jury chose … to infer an intent to commit larceny from the appellant's unusual and surreptitious activities does not mean that its decision was based on conjecture and surmise." ***Id***. at 517, 214 A.2d at 266.

The facts surrounding the circumstances of the incident at hand are sufficient to lead to the conclusion that [Johnson] intended to commit a crime in the apartment of Mr. Carrell and Daniel Carrell on October 26. When Mr. Carrell returned to his apartment after meeting with his cousin, [Johnson] did not announce his presence. When Mr. Carrell was leaving the bathroom, he saw [Johnson] getting out from under the bed and to his feet in Daniel's room. When Mr. Carrell confronted [Johnson], he claimed that he was moving someone out of the apartment, but according to testimony from both Daniel and Mr. Carrell, no one was moving out of the building at that time, there were no other movers at the building, and there was no moving equipment present. [Johnson] then fled from the building and continued to run from Mr. Carrell during a lengthy chase. [Johnson's] intent to commit a crime inside the Carrells' apartment can be inferred from his unusual behavior when Mr. Carrell first found him in the apartment, his lack of explanation regarding his presence in the apartment, and his flight from the

> apartment upon Mr. Carrell's confrontation. This circumstantial evidence shows that [Johnson] had the necessary intent to commit a crime inside the apartment of Mr. Carrell and Daniel Carrell after entering.

Trial Court Opinion, supra, at 6-7 (record citations omitted).

The trial court has provided a well-reasoned and common sense analysis of the evidence presented at trial.[8] The trial court's determination is supported by the certified record and we find no basis upon which to disturb the decision of the trial court. Accordingly, we conclude the Commonwealth presented sufficient evidence to prove beyond a reasonable doubt that Johnson possessed the requisite intent to commit a crime upon entering the Carrell apartment.

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[8] The instant facts remind us of the circumstances as elaborated by Justice McDermott in his opinion supporting affirmance in ***Commonwealth v. Wagner***, in which he stated,

> When a stranger first tries to enter your garage and then breaks the window of your door, on a given evening, neither you nor a jury should be considered harsh, if you believe he is not an aimless waif bringing compliments of the evening, or a passing sojourner of eccentric ways, or a harmless loiterer in the evening shadows.
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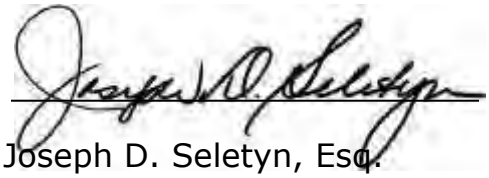
> Those supporting reversal would have us believe that hiding in your bedroom under such conditions is an unnecessary foolishness in the presence of simple pleasantries. They would see no evil through such jaundiced eyes, hear none in the melodious tinkle of your breaking window, and obviously would say no evil of a man with an umbrella. The jury could find, and did, more sinister reasons afoot.

Commonwealth v. Wagner, 566 A.2d 1194, 1194 (Pa. 1989). This language was also recently cited in ***Commonwealth v. Alston***, ***supra***.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/29/2014